

ISSUES

The Administrative Law Judge denied claimant's request for benefits upon the basis that claimant had failed to give notice of injury to the employer as required by K.S.A. 44-520, as amended. Claimant requests the Appeals Board review this finding. The issues now before the Appeals Board are:

- (1) Whether claimant experienced accidental injury in late January or early February 1994 or whether claimant experienced a series of accidental injuries or mini-traumas from January 1994 through March 8, 1994.
- (2) If claimant did not continue to experience injury through March 8, 1994, whether he provided notice of accidental injury to the respondent within ten (10) days of the accident as required by K.S.A. 44-520, as amended.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After having reviewed the entire record, and for preliminary hearing purposes, the Appeals Board finds, as follows:

- (1) The Order of Administrative Law Judge Alvin E. Witwer, dated June 24, 1994, denying claimant's benefits in this proceeding should be affirmed.

In either late January or early February 1994, claimant alleges that he hurt his back while handling cylinders during the course of his employment with the respondent. Claimant continued to work for respondent and first sought medical treatment from his family physician, Dr. Speer, on March 2, 1994. Dr. Speer's records are not provided. Later that evening or the next, claimant sought treatment at the hospital emergency room in Ottawa, Kansas, as a result of increased symptomatology. The medical records from the emergency room are not provided. On March 10, 1994, claimant saw William A. Bailey, M.D., an orthopedic surgeon in Lawrence, Kansas. The medical notes from Dr. Bailey's office omit history of traumatic injury in January or February 1994, but do indicate to the contrary that there was no known injury and that claimant gradually developed pain over his lower dorsal spine over the past month. Dr. Bailey's notes also indicate no past history of back problems. Claimant testified that he had previous injury to his back.

Claimant testified that he notified his immediate foreman, Greg Jenkins, of the accident on the day it happened. Mr. Jenkins testified at the Preliminary Hearing that claimant did not. Claimant testified that on March 9, 1994, he told one of his supervisors, Richard Alexander, that he was having back problems due to work. Claimant changed this testimony to indicate what he actually told Mr. Alexander was that he was having back problems, but they were not specifically caused by work. Mr. Alexander testified at the Preliminary Hearing and denies that claimant told him about his back problems in that conversation. On cross-examination of claimant, respondent's counsel established that claimant had previously provided a different history of accident than he described to the Administrative Law Judge. Claimant's testimony also conflicts with that of the president of the respondent company, Thomas James Hardwick, who also testified at the Preliminary Hearing. Claimant contends he told Mr. Hardwick he had sustained a work-related injury to his back before being notified of his termination for absenteeism. Mr. Hardwick denies that contention and testified that claimant spoke of a back injury only after being advised of his termination.

Based upon the evidence presented and the various conflicts and inconsistencies, the Appeals Board finds that claimant has failed to establish his entitlement to workers compensation benefits. In proceedings under the Workers Compensation Act, the burden of proof shall be on the claimant to establish his right to an award of compensation and to prove the various conditions on which his right depends. See K.S.A. 44-501. "Burden of proof" means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not. See K.S.A. 44-508(g).

The Appeals Board finds that claimant first gave respondent notice of accident after he was terminated by Mr. Hardwick on March 11, 1994. K.S.A. 44-520, as amended, requires an injured worker to provide notice of accident within ten (10) days of its occurrence, or establish just cause for failure to give such notice. The Appeals Board finds that the evidence presented to date fails to prove it is more probably true than not that claimant experienced accidental injury subsequent to late January or early February 1994, or otherwise sustained a back injury continuing through a date within ten (10) days of March 11, 1994. Regarding just cause for failure to provide timely notice, the Appeals Board is unable to make that finding based upon the present record.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Preliminary Hearing Order of Administrative Law Judge Alvin E. Witwer, dated June 24, 1994, should be, and hereby is, affirmed in all respects.

IT IS SO ORDERED.

Dated this ____ day of September, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Derek R. Chappell, PO Box 927, Ottawa, KS 66067
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Alvin E. Witwer, Administrative Law Judge
George Gomez, Director